United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF AND APPENDIX

76-1460

To be argued by
THOMAS P. SMITH

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1460

B
P/s

UNITED STATES OF AMERICA,

Appellee,

—v.—

JESUS ORTIZ,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF AND APPENDIX FOR THE APPELLEE

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1460

UNITED STATES OF AMERICA,

Appellee,

—v.—

JESUS ORTIZ,

Appellant.

BRIEF FOR THE APPELLEE

Statement of the Case

A Grand Jury in Hartford returned a three-count indictment on March 25, 1976, charging Jesus Ortiz, a/k/a "Chombo", and Enrique Melendez, a/k/a "Kiki", with distributing cocaine, possessing cocaine with intent to distribute it, and conspiring to distribute that substance. Title 21, United States Code, sections 841(a)(1) and 846.

On July 7, 1976, a special purpose information was filed with the District Court, charging Ortiz with previously having been convicted of a federal narcotics

violation.[1] After preliminary arguments a jury was selected on that same day.

Due to the unavailability of counsel for the defendant Melendez, his case was severed from that against Jesus Ortiz. On July 27, 1976 trial commenced before the Honorable T. Emmet Clarie, Chief Judge, and a jury. Testimony was completed on that same day. At 2:48 P.M. on the following day the jury returned a verdict of guilty on all three counts.

On September 27, 1976, the Court sentenced Jesus Ortiz to seven years on each count, the sentences on each to run *concurrently*, and a three year special parole term. It is from this judgment that Jesus Ortiz appeals.

Statutes Involved

Rule 609, Federal Rules of Evidence, 28 U.S.C.A.

> (a) General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess

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[1] That information, denominated by the government as a "Notice" to the Court in order to avoid clerical confusion, was filed pursuant to Title 21, United States Code, section 851(a)(1). The theoretical effect of such a filing is to double the maximum sentence to which a defendant is exposed. Thus, on *each* of the three counts on which Ortiz was convicted, his maximum exposure was 30 years imprisonment. *See* App. 1a. The purpose of Congress in enacting his provision is explained in *United States* v. *Buia*, 236 F.2d 548, 550 (2d Cir. 1956). Also see *Tanzer* v. *United States*, 278 F.2d 137, 140 (9th Cir.), *cert. denied*, 364 U.S. 863 (1960).

of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

Rule 801, Federal Rules of Evidence, 28 U.S.C.A.

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay. A statement is not hearsay if—

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or

* * * * *

Issues

1. Was it reversible error to permit an undercover officer and an informant to testify as to certain, non-incriminatory statements which were made by a co-conspirator on the afternoon prior to the cocaine distribution, and were obviously designed to encourage their return to the building where the defendant lived to purchase cocaine?

2. Were the circumstances surrounding the joint drug transfer on February 10, 1976, sufficient to support the District Court's finding that the conspiracy was in existence on the late afternoon of February 9, 1976, and that co-conspirator Melendez's remarks were in furtherance of it?

3. Did the District Court commit an abuse of discretion by refusing to prohibit the government from using appellant's previous heroin distribution conviction for impeachment purposes?

Statement of the Facts

On the afternoon of February 9, 1976, undercover Connecticut State Trooper Rafael Valentin and Luis Placidio Lopez, a confidential informant who was then assisting state and federal narcotics authorities in numerous on-going drug investigations, drove to a multi-family apartment building located at 15 Cabot Street in Hartford (Tr. 4-5, 9; 105-106).[2] Their purpose in going there was to purchase a "quarter piece" (i.e., one-fourth

[2] References marked "(Tr. ....)" refer to the transcript of the trial before the United States District Court.

ounce) of cocaine[3] from Efrain Melendez, a/k/a "Frankie", the brother of defendant Kiki Melendez and the brother-in-law of Jesus Ortiz (Tr. 9-10, 59-60).[4] Although neither Frankie Melendez nor Kiki Melendez resided at 15 Cabot Street at that time (Tr. 8, 168), they were frequently on the premises (Tr. 168-169). Jesus Ortiz resided at 15 Cabot Street (Tr. 169).

Trooper Valentin and Lopez entered 15 Cabot Street and west to a second floor apartment where they met two unidentified females and asked for Frankie Melendez (Tr. 10). During the course of this conversation, Kiki Melendez came to the door of the apartment and asked what Valentin and Lopez wanted with Frankie (Tr. 17). Valentin and Lopez told Kiki Melendez that they wanted to buy a "quarter piece" of cocaine from Frankie (Tr. 21). Kiki responded that Frankie was not there and

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[3] Trooper Valentin, a law enforcement officer with over eight years experience, approximately three years of which have been devoted to narcotics investigations, testified that the term "quarter piece" refers to bulk narcotics, as opposed to bags, which contain a smaller amount of controlled substance. Valentin further testified that the "going price" for a "quarter piece" of cocaine is between $700 and $900, and that it is a fairly large quantity by Connecticut standards (Tr. 19). It was further established by Valentin that there are approximately 75 to 100 bags in a "quarter piece", and that the average price per bag of cocaine was approximately $20 at the time of trial (Tr. 19-20).

[4] To minimize confusion between the Melendez brothers, Enrique Melendez, the co-defendant of Jesus Ortiz will hereafter be referred to as Kiki Melendez. Efrain Melendez, a/k/a "Frankie Quevas", will hereafter be referred to as Frankie Melendez. This procedure was used during the trial (Tr. 7-8, 59-60). Appellant Ortiz, a/k/a "Chombo", was regularly referred to throughout the trial by his proper name, except on a few occasions when Luis Lopez, the government's chief witness, referred to him as "Mr. Chombo". (*See e.g.*, Tr. 123). *Also see* Government's Memorandum in Support of the Admissibility of Subsequent Similar Acts, App. 2a, and argument in support thereof.

that Frankie's cocaine was "under lock and key" (Tr. 21). Kiki Melendez then volunteered that he had only "bags" of cocaine (Tr. 21). Kiki further stated that he would "deal" with Luis Lopez, but would not sell directly to Valentin (Tr. 22).[5]

Valentin and Lopez stated that they were interested in "bags", but wanted a "quarter piece". They then left 15 Cabot Street and drove directly to a bar at the corner of Albany and Chestnut Street in Hartford, looking for Frankie Melendez (Tr. 23). That bar, widely known by law enforcement simply as the "Spanish Bar", is located minutes away from 15 Cabot Street (Tr. 23).

Shortly after arriving at the Spanish Bar, while Lopez and Valentin were still seated outside in their undercover vehicle, they again saw, and engaged in brief conversation with, Kiki Melendez. Melendez, who had walked to the passenger side of the car in which Valentin and Lopez were sitting, reiterated once again in Valentin's presence that he would sell "bags" of cocaine to Lopez, but that he would not "deal" with Valentin (Tr. 24-25; 67). Melendez finally instructed that if Lopez wanted bags of cocaine, he should go back to 15 Cabot Street alone (Tr. 25, 67).

Pursuant to Kiki Melendez's directions, Luis Lopez and Rafael Valentin returned to 15 Cabot Street on the following day, February 10, 1976 (Tr. 26). Pursuant also to Kiki Melendez's instructions of the previous day, Luis Lopez entered 15 Cabot Street alone, leaving Trooper

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[5] These statements by Kiki Melendez were made directly in the presence of Rafael Valentin. Although the conversation was in Spanish, Trooper Valentin had no trouble understanding it, since he is a native of Puerto Rico and fluent in Spanish (Tr. 3).

Valentin seated outside in his automobile,[6] and went to the same second floor apartment to which he and Valentin had gone the afternoon before (Tr. 25, 68). At this apartment Lopez met an unidentified woman and a young man. Lopez informed both of these people that he was looking for Frankie Melendez and that he wanted to buy a "quarter piece" of cocaine (Tr. 68). The young man responded that "Frankie is not here", and "Kiki is sleeping" (Tr. 68). Lopez then left the building to rejoin Valentin (Tr. 68).

Just as Lopez left the building, however, the young unidentified man with whom he had just spoken called him from a second floor window overlooking the sidewalk, telling him to come back (Tr. 68). Lopez's exit and almost immediate reentry was witnessed by Trooper Valentin (Tr. 30). Luis Lopez then returned to the same apartment where he met Kiki Melendez and stated that he wanted a "quarter piece". Melendez responded that he only had 15 bags of cocaine which he would sell for $180 (Tr. 69). Lopez stated that he would get the money from his friend outside, and left once again to rejoin Valentin (Tr. 69, 31).

Lopez then reentered 15 Cabot Street with money obtained from Valentin. When Lopez got to the second floor of the building he again met Kiki Melendez. Melendez then led Lopez to the third floor of 15 Cabot Street, where Jesus Ortiz, a/k/a "Chombo", was standing in the open doorway of his apartment, waiting for Kiki

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[6] Prior to going to 15 Cabot Street on February 10th, Lopez and Valentin met with surveillance troopers and federal agents at a rented apartment which was used as a "base of operations" during this and other investigations in progress at the time. As part of normal procedures Lopez was searched, both for contraband and money, before entering 15 Cabot Street (Tr. 26-29).

Melendez and Lopez (Tr. 69). Ortiz then "hollered to a woman who was in the front room" to bring him the cocaine (Tr. 69, 70). An unidentified woman thereupon appeared and produced an aspirin tin, which she handed to Ortiz (Tr. 70). Ortiz opened the tin and counted out 15 tinfoil packets, which he handed to Melendez (Tr. 70). Melendez then recounted them and handed the packets to Lopez (Tr. 70). Lopez then handed Melendez $180, which Melendez then handed to Ortiz (Tr. 70). Ortiz then counted the money (Tr. 71). At the conclusion of the transaction, Lopez left 15 Cabot Street and immediately surrendered these 15 bags to Trooper Valentin (Tr. 78). These bags contained cocaine (Tr. 150-152).[7]

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[7] Page 3 of Appellant's brief contains the assertion that "Before proceeding to the third floor of the building, he [Lopez] had never seen Ortiz (other than a few unspecified encounters on the street) or heard his name mentioned by anyone as a source of cocaine." This is not correct. Lopez testified that he knew Jesus Ortiz by his street name, "Chombo"; that he had known him since 1971 or 1972; that he had seen him "in the street, hanging around"; that he was related to the Melendez brothers; and that the source of this relationship was his marriage to Kiki Melendez's sister (Tr. 60-61). Thus there is absolutely no basis for the first prong of appellant's assertion, or any implication that there might have been a misidentification by Lopez. See also App. 2a.

The second prong of appellant's statement (i.e., that Lopez had never heard Ortiz's name mentioned as a source of cocaine) is also misleading. It is true that Kiki Melendez did not specifically mention Jesus Ortiz by name on either February 9th or 10th. But this most emphatically does not mean that neither Luis Lopez nor Trooper Valentin had heard Ortiz's name mentioned as a source of narcotics.

I.

The District Court properly admitted testimony of co-conspirator Kiki Melendez's remarks on February 9, 1976.

Appellant's statement of the issue assumes the thing in question. The issue is not whether it is sometimes[8] reversible error to admit into evidence pre-conspiracy hearsay statements of co-conspirators, but whether Kiki Melendez's remarks to Luis Lopez and Trooper Valentin

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[8] The erroneous admission of hearsay does not, contrary to appellant's suggestion, constitute reversible error simply by virtue of the declarant's status as a co-conspirator. In order to constitute reversible error there must be a demonstration of prejudice and some adverse impact upon substantial rights. Rule 52(a), F.R.Crim.P. Also see *United States* v. *Cianchetti*, 315 F.2d 584, 589-590 (2d Cir. 1963). In determining whether there has been prejudice, several factors merit consideration. These at least include the apparent reliability of the declaration, *United States* v. *Puco*, 476 F.2d 1099 (2d Cir.), *cert. denied*, 414 U.S. 844 (1973); whether and the extent to which, the declaration incriminates or even mentions the defendant, *United States* v. *Morello*, 250 F.2d 631, 634 (2d Cir. 1957); *United States* v. *Lee*, 413 F.2d 910, 912, 914 (7th Cir. 1969); *United States* v. *Payseur*, 501 F.2d 966, 973 (9th Cir. 1974); the relevance of the declaration in establishing the modus operandi of the conspiracy and its nature, *United States* v. *Witt*, 215 F.2d 580, 583 (2d Cir. 1954) (Frank, J.); Developments in the Law—Conspiracy, 72 Harv. L. Rev. 920, 986, nn. 504, 505 (1959); whether, and the extent to which either the prosecution or the testimony itself "painted" the defendant as guilty by impermissibly connecting him with the commission of an entirely separate criminal offense, *United States* v. *Vaught*, 485 F.2d 320, 321-322 (4th Cir. 1973); the extent to which the hearsay testimony might have actually *aided* the defense, *Ebeling* v. *United States*, 248 F.2d 429, 438 (8th Cir. 1957); and the extent to which admission of the testimony "devastated" the defense, *United States* v. *Vaught*, *supra*; *United States* v. *Morello*, *supra*. There has been no showing of prejudice in the present case, nor can there be since there was none.

on the afternoon of February 9, 1976 truly were pre-conspiracy hearsay statements. The government respectfully submits they were not, and that the District Court properly admitted them into evidence for the following reasons.

There was clear and convincing independent evidence of a narcotics conspiracy between Jesus Ortiz and Kiki Melendez on February 10, 1976. Luis Lopez testified that Jesus Ortiz called an unidentified woman from an adjoining room in his apartment and that, at Ortiz's request, she produced an aspirin tin containing cocaine. Ortiz removed 15 bags of cocaine from this container and handed them to Kiki Melendez who, in turn, handed them to Luis Lopez. The $180 which Lopez paid for this cocaine passed through Kiki Melendez's hands ultimately to Jesus Ortiz (Tr. 69-70; 91-95; 145-146). Despite vigorous cross-examination by the defense (Tr. 78-144), Luis Lopez's testimony was found by the jury to be a true and factual account of what happened in Jesus Ortiz's apartment on February 10, 1976. Viewed in a light most favorable to the government, *Glasser* v. *United States*, 315 U.S. 60, 80 (1942), *reh. denied sub nom., Kretske* v. *United States*, 315 U.S. 827; *United States* v. *Conti*, 339 F.2d 10, 13 (6th Cir. 1964), this evidence alone fully supports appellant's conviction on each of the three counts of the indictment.

Although the precise moment at which the conspiracy between Jesus Ortiz and Kiki Melendez came into being is difficult, if not impossible, to prove, *see, e.g.*, Developments in the Law—Conspiracy, 72 Harv. L. Rev. 920, 986, particularly at nn. 501-505 (1959), the circumstances surrounding the February 10, 1976 transaction compel the conclusion that the formation of the conspiracy well *preceded* the physical transfer of the cocaine to Luis Lopez. As the testimony before the District Court indicated, Jesus Ortiz, the only known conspirator

who resided at 15 Cabot Street (Tr. 174, 171), was waiting at the open door of his apartment as Kiki Melendez led Luis Lopez from the second floor hallway to the third floor (Tr. 69, 75). Once inside the apartment appellant Ortiz produced the cocaine, which Kiki Melendez had moments earlier described as being in short supply in the neighborhood and as belonging to "them" (Tr. 89). There was no negotiation between Luis Lopez and Jesus Ortiz (Tr. 76). The appellant simply produced the same produced the same type of controlled substance, in the same configuration (i.e. bags as opposed to bulk), and in the same quantity that Kiki Melendez had previously mentioned. There was no disagreement or discussion among Ortiz, Melendez and Luis Lopez as to price which Melendez had negotiated for the cocaine. Following a mechanistic and obviously prearranged procedure, Ortiz automatically handed the cocaine to Melendez who, in turn, handed it to Lopez and received back the money (Tr. 77). The cocaine and the money were "double counted" by Ortiz and Melendez (Tr. 70-71).

On the basis of the foregoing the District Court reasonably, and quite properly, concluded that, at the very least, the conspiracy between Kiki Melendez and Jesus Ortiz was in existence on the late afternoon of February 9, 1976, *United States* v. *Green*, 523 F.2d 229, 233, n. 4 (2d Cir. 1975); *United States* v. *Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970), and that Kiki Melendez's remarks at that time were clearly in furtherance[9] of it. Kiki Melendez's remarks

[9] Both the classical co-conspirators exception to the hearsay rule and the exception from the definition of hearsay created for co-conspirators' statements by Rule 801(d)(2)(E), Federal Rules of Evidence, require that, to be admissible, a statement be made in furtherance of a conspiracy and during its pendency. The government respectfully submits that these requirements—

[Footnote continued on following page]

to Luis Lopez and Trooper Valentin were obviously calculated to achieve certain objectives. First of all, they were designed to interest Lopez and Valentin in bags of cocaine as opposed to bulk. Secondly, they were intended to encourage Luis Lopez to return to 15 Cabot Street. And thirdly, they were devised to guaranty that he returned there alone. Moreover, since Melendez invited Lopez to return to 15 Cabot Street when Melendez himself was outside the Spanish Bar, his remarks carried the clear implication that the cocaine was even then being held back at the building where Jesus Ortiz lived. Finally, assuming that Kiki Melendez's statement of February 10th was true (i.e., that there actually was a shortage of cocaine in the neighborhood and that nobody but "them" had any) it is reasonable to conclude that the cocaine which was ultimately sold on February 10th was the same cocaine offered to Lopez on the late afternoon of February 9, 1976. Thus, while the *result* of the conspiracy was an unlawful distribution of cocaine by Melendez and appellant Ortiz on February 10, 1976, the circumstances surrounding that distribution manifestly indicate an illegal confederation in existence at a much earlier point in time.

On the basis of the foregoing, the government respectfully submits that Kiki Melendez's statements are excluded from the definition of hearsay under Rule 801 (d) (2) (E) and that appellant's claim to the contrary should be rejected. Additionally, the government submits

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the *furtherance* requirement and the *pendency* requirement, *see* Developments in the Law—Conspiracy, 72 Harv. L.R. 920 (1959) —are conceptually overlapping and that a statement clearly in furtherance of an unlawful objective may in itself constitute circumstantial evidence sufficient to fulfill the pendency requirement. This is especially so where, as here, such a statement is followed closely in time by the execution of a joint criminal enterprise.

that the testimony of Luis Lopez also provided adequate foundation for characterizing Melendez's February 9th remarks as non-hearsay under Rule 801(d)(2)(B), (C), and (D) as well. These provisions contemplate, respectively, the admissibility of ratified statements, authorized statements, and statements of agents. The logical conclusion to be drawn from Luis Lopez's testimony concerning the cocaine distribution of February 10, 1976, is that there was a pre-existing agreement between Kiki Melendez and the appellant, whereby Melendez clearly possessed authority to negotiate for the sale of cocaine held by Jesus Ortiz. Kiki Melendez's entreaties to Lopez on February 9, 1976 were an integral part of the negotiation process and directly resulted in Lopez being at 15 Cabot Street on the following day. Ortiz's actions at that time constitute circumstantial evidence of Kiki Melendez's authority (within the meaning of 801(d)(2)(C)), his agency (within the meaning of 801(d)(2)(D)), and appellant's ratification or adoption of Melendez's earlier statements (within the meaning of 801(d)(2)(B)).

The government further submits that Kiki Melendez's remarks were also admissible as verbal acts, relevant to show the existence of a conspiracy and to explain that Melendez's purpose in going to the Spanish Bar on the afternoon of February 9th was to interest Lopez in the purchase of *bags* of cocaine and to encourage him to return to 15 Cabot Street alone. Lopez's return to 15 Cabot Street, the residence of Jesus Ortiz, was a logical consequence of Kiki Melendez's action on February 9th. Melendez's act of walking to the automobile in which Valentin and Lopez were seated was in itself ambiguous and could only be given its proper significance by permitting testimony as to the words which accompanied that act. See 6 Wigmore, Evidence §§ 1772-1777 (Chadbourn rev. 1976). In the words of Judge Friendly:

> "no preliminary showing is needed to allow the jury's consideration of what others have *done*, including 'verbal acts,' insofar as such acts show the conspiracy's existence and scope and the consequent likelihood of any defendants being a part of it. . . . Without detracting from our reaffirmation of this position, we note that no hearsay declarations appear to have been offered here; the notion that evidentiary use of anything emerging from the mouth is banned unless it comes within an exception to the hearsay rule is as fallacious as it is durable." *United States* v. *Nuccio*, 373 F.2d 168, 173-174 (2d Cir.), *cert. denied*, 387 U.S. 906 (1967).

Also see *United States* v. *D'Amato*, 493 F.2d 359, 363 (2d Cir.), *cert. denied*, 419 U.S. 826 (1974); *United States* v. *Ragland*, 375 F.2d 471 (2d Cir. 1967), *cert. denied*, 390 U.S. 925 (1968); *United States* v. *Padilla*, 374 F.2d 996 (2d Cir. 1967); *United States* v. *Frank*, 494 F.2d 145, 155 (2d Cir.), *cert. denied*, 419 U.S. 828 (1974).[10]

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[10] Alternatively, the government submits that the remarks of Kiki Melendez to Trooper Valentin and Luis Lopez on February 9, 1976 did not constitute hearsay in any event, since they were not offered to prove the truth of the matter asserted, but rather the effect of those words upon Luis Lopez. See Rule 801(c), Federal Rules of Evidence. Melendez's remarks were the reason that Luis Lopez entered 15 Cabot Street *alone* on February 10, 1976. Since Melendez had voiced suspicions of Valentin, Lopez had no choice but to enter alone. This was relevant, since the defense theory was that *because* Lopez was alone his testimony could not be believed beyond a reasonable doubt. Additionally, the government submits that Kiki Melendez's remark, "if [you] want to buy some bags come over to 15 Cabot Street," is not, and was not intended as, an "assertion" within the meaning of Rule 801(a).

Assuming, however, that Kiki Melendez's remarks on February 9, 1976 did constitute hearsay, the government nonetheless submits that their admission resulted in no prejudice to the defendant. Rule 52(a), F. R. Crim. P.; *United States* v. *Cianchetti*, 315 F.2d 584, 589-590 (2d Cir. 1963). Melendez's remarks to Lopez and Valentin on February 9th were not damaging to the defendant. Not only did Melendez's remarks not incriminate the appellant, they did not even refer to him. On this basis alone appellant's claim of error should be rejected. See *United States* v. *Morello*, 250 F.2d 631, 634 (2d Cir. 1957); *United States* v. *Payseur*, 501 F.2d 966, 973 (9th Cir. 1974).

In no way did the admission of testimony regarding Melendez's remarks undercut appellant's defense. Analysis of the extensive cross-examination of Luis Lopez demonstrates that the defense theory was that Lopez was a "bounty hunter" who had falsely implicated Jesus Ortiz simply to obtain money from the Connecticut State Police and the Drug Enforcement Administration. The admission of testimony concerning Melendez's remarks on February 9th was in no way inconsistent with this theory. In fact, far from being devasting to the defense, Melendez's statements may have actually *supported* the theory, since at no time on February 9th did Melendez mention Ortiz's name, and at all times stated that "I have bags of cocaine." *Ebeling* v. *United States*, 248 F.2d 429, 438 (8th Cir. 1957).

The present case is clearly distinguishable from *United States* v. *Vaught*, 485 F.2d 320 (4th Cir. 1973). In that case the District Court permitted a government informant to testify that, on an occasion nearly two months prior to the offense for which the defendants were on trial, he purchased narcotics from one Raymond Gore, and that during this transaction Gore stated that he ex-

pected to see the defendant Isaac Lee soon. There was absolutely no evidence connecting either Vaught or the defendant Lee to the commission of this entirely separate criminal offense. *Vaught*, in sum, involved the admission of a "mass of inadmissible, irrelevant, and highly prejudicial testimony [which] *unfairly permitted the prosecution to paint Lee and Vaught before the jury as bad men associating with a criminal companion.*" *Id.* at 323. (Emphasis added).

Unlike the situation in *Vaught*, where the informant testified that Raymond Gore, during the course of a narcotics sale, said he expected to see the defendant soon, here Luis Lopez testified that Kiki Melendez never mentioned Jesus Ortiz's name. Hence it cannot be said that the testimony created a false and prejudicial association between the two. Moreover, the testimony of Valentin and Lopez as to Melendez's remarks on February 9, 1976, did not establish the commission of an entirely separate criminal offense occurring some two months previous. Nor was there any attempt on the part of the prosecutor to "paint" Jesus Ortiz as guilty by reason of his "association" with Kiki Melendez. In sum, *Vaught* is distinguishable from the present case.

Much more closely approximating the facts of the present case are *United States* v. *Lee*, 413 F.2d 910, 914 (7th Cir. 1969); *Jordan* v. *United States*, 428 F.2d 7, 10 (9th Cir.), *cert. denied*, 400 U.S. 946 (1970); *United States* v. *Milisci*, 465 F.2d 700, 723 (5th Cir. 1972); *United States* v. *Morello*, *supra;* and *United States* v. *Vigi*, 363 F.Supp. 314, 317 (E.D.Mich. 1973). In each of these cases the court focused not upon the declarant's status, but upon the nature and effect of the challenged testimony, ultimately holding it to be harmless. Assuming *arguendo* that the Court finds the testimony as to Kiki Melendez's remarks of February 9th to have been

inadmissible hearsay, the government respectfully submits that its admission should also be viewed as harmless.[11] Appellant's conviction should, therefore, be affirmed.

II.

The District Court had reasonable grounds for finding that the conspiracy was in existence on the afternoon before the commission of the substantive offenses.

There is no basis for appellant's claim that the District Court "refuse[d] to apply the 'fair preponderance of evidence' test" in determining whether the conspiracy between Kiki Melendez and Jesus Ortiz was in existence on February 9, 1976. Assuming *arguendo* that the remarks of Kiki Melendez were admissible only under Rule 801 (d) (2) (E), the sole issue is whether the trial court had reasonable grounds to conclude that the preponderance of evidence did, in fact, tip toward the existence of the conspiracy on February 9th. As the Court in *United States* v. *Green*, 523 F.2d 229, 233, n.5 (2d Cir. 1975) observed:

> "If out-of-court statements by alleged co-conspirators are testified to in the course of a conspiracy trial, the court may wait until all the evidence is in to determine if a conspiracy has been sufficiently

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[11] Appellant does not complain that the admission of testimony concerning Kiki Melendez's remarks of February 9, 1976, was a surprise or that it resulted in material variance from Count One of the indictment, which charged a conspiracy "on or about February 10, 1976." Any complaint in this regard is foreclosed by the fact that, although this was not an open file case, well prior to trial the government supplied the defense with that portion of the police report which set forth Kiki Melendez's statements of February 9th (Tr. 42, 85-86).

> established by non-hearsay evidence to allow the jury to consider the hearsay testimony as well. If the judge does allow the jury to consider the out-of-court statements, *we must assume that he made the necessary finding and our only task is to decide if he had reasonable grounds for doing so.*" *Id.* (Emphasis added).

Also see United States v. *Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970).

The government respectfully submits that there most clearly are "reasonable grounds" to support the trial court's finding. In making its determination the District Court was entitled to rely upon circumstantial, as well as direct, evidence. *Hamling* v. *United States*, 418 U.S. 87, 124 (1974); *United States* v. *Green*, 523 F.2d 233, n.5. Additionally, since appellant's motion to strike was not made until after *both* sides had rested (Tr. 199), the District Court was also entitled to consider the testimony of defense witnesses, and to draw from that testimony both positive and negative inferences.

Edna Melendez Ortiz, appellant's wife, testified that she had a distinct recollection that her husband and Frankie Melendez had a fight on the weekend before February 9th, and that as a result Jesus Ortiz and Kiki Melendez were not on friendly terms at the time when Luis Lopez placed them together. Mrs. Ortiz, whose demeanor was consistent with her testimony, also swore that she was constantly with her husband during the month of February and that she had never seen Luis Lopez. This testimony, which simultaneously provided a "defense" for both Kiki and the appellant (and Frankie Melendez as well, *see* App. 2a), was rejected by the jury. The trial court was equally entitled to reject it, and further entitled to infer that it was diametrically opposed to the truth.

This testimony, coupled with the circumstances surrounding the February 10th drug sale (which are more fully set forth in Part I, *supra*) point to a well-established, inter-family conspiracy, involving Jesus Ortiz and his brother-in-law and centered at the building where Jesus Ortiz lived. There are, in short, "reasonable grounds" for the District Court's ruling. Appellant in effect concedes this by describing the connection between Melendez's February 9th remarks and the February 10th drug sale as a "close question." *See* Appellant's Brief at 10.

III.

The District Court did not abuse its discretion by refusing to prohibit the government from using appellant's 1972 heroin distribution conviction for impeachment purposes.

Although the District Court refused to issue a pretrial ruling prohibiting the government from using appellant's 1972 heroin distribution conviction for impeachment purposes, it was not until *after* the defense had cross-examined Luis Lopez, and had presented the testimony of two defense witnesses, that the trial court ruled that the government *could* utilize appellant's conviction if he chose to testify (Tr. 185-186). Without making any offer of proof as to what his testimony would have been, appellant at this juncture indicated that he would not testify. Under these circumstances the trial court most certainly did not abuse its discretion in denying appellant's motion.

A. The balancing test of Rule 609(a) vests wide discretion in the trial court and contemplates consideration of many variables

Rule 609(a) of the Federal Rules of Evidence strikes a balance between the traditional view that any prior felony conviction could be used for impeachment purposes and the approach set forth in *United States* v. *Luck*, 348 F.2d 763 (D.C.Cir. 1965), that only convictions involving dishonesty or false statements could be utilized. Accordingly, impeachment on the basis of a prior felony conviction is permissible under Rule 609(a)(1) if "the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant." By its terms, therefore, the Rule authorizes the trial court to exercise its discretion in determining whether, in the context of a *particular* case, the truth-seeking process would be advanced by either prohibiting or permitting the use of a particular conviction for impeachment purposes. This requires consideration of many variables.

> "The statute, in our view, leaves room for the operation of a sound judicial discretion to play upon the circumstances as they unfold in a particular case. There may well be cases where the trial judge might think that the cause of truth would be helped more by letting the jury hear the defendant's story than by the defendant's foregoing that opportunity because of the fear of prejudice founded upon a prior conviction. There may well be other cases where the trial judge believes the prejudicial effect of impeachment far outweighs the probative relevance of the prior conviction, to the issue of credibility. This last is, of course, a standard which trial judges apply every day in other contexts; and we think it has both utility and applicability in this field.

> In exercising discretion in this respect, a number of factors might be relevant, such as the nature of the prior crimes, the length of the criminal record, the age and circumstances of the defendant, and, above all, the extent to which it is more important to the search for truth in a particular case for the jury to hear the defendant's story than to know of a prior conviction. The goal of a criminal trial is the disposition of the charge in accordance with the truth. The possibility of a rehearsal of the defendant's criminal record in a given case, especially if it means that the jury will be left without one version of the truth, may or may not contribute to that objective. The experienced trial judge has a sensitivity in this regard." 3 Weinstein, Evidence ¶ 609[03].

Frequently the balancing process "involves intangibles for which an appellate court's feel is nebulous at best." *Brooke* v. *United States*, 385 F.2d 279, 286 (D.C.Cir. 1967) (permitting under the circumstances of that case two prior drug convictions to be used for impeachment at defendant's narcotics trial).

Although *United States* v. *Palumbo*, 401 F.2d 270 (2d Cir. 1968), offers guidance to District Courts as to the factors which should be considered in balancing probative value against prejudicial effect, that decision as well recognizes that it is the trial court which is most familiar with the circumstances of a particular case, and hence often in the best position to determine in which direction the balance tips. Neither *Palumbo*, nor *United States* v. *Puco*, 453 F.2d 539 (2d Cir. 1971), prohibits a defendant's impeachment in a narcotics trial on the basis of a recent felony conviction also involving narcotics. *Id.* at 543, n.10. Both decisions implicitly recognize that there may be instances in which such impeachment is appropri-

ate and, as other circuits have found, fair. *See* generally, *United States* v. *McIntosh*, 426 F.2d 1231, 1233, n.2 (D.C. Cir. 1970); *United States* v. *Escobedo*, 430 F.2d 14, 18-20 (7th Cir. 1970); *United States* v. *Villegas*, 487 F.2d 833 (9th Cir. 1973); *United States* v. *Rucker*, 496 F.2d 1241 (8th Cir.), *cert. denied*, 419 U.S. 965 (1974); *United States* v. *Davis*, 501 F.2d 1344 (9th Cir. 1974); *United States* v. *Clossen*, 383 F. Supp. 1119, 1123-1124 (E.D.Pa. 1974) (all of which permitted the use of prior narcotics convictions for impeachment purposes in subsequent narcotics trials).

B. Under the circumstances of the present case the District Court cannot, and should not, be held to have abused its discretion in denying appellant's motion

The degree to which a defendant is likely to testify truthfully can sometimes be foretold by considering the veracity of the testimony of those whom he has called to the stand on his behalf. In the present case appellant's renewed motion was preceded by the testimony of one Samuel Worthen [12] and appellant's wife, Edna Melendez Ortiz. The jury's verdict stands as a monument commemorating their rejection of Mrs. Ortiz's testimony, and that of Samuel Worthen as well. At least in the case of Mrs. Ortiz, the jury might well have found her testi-

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[12] The government was precluded from effectively impeaching Samuel Worthen by virtue of the defense's failure to provide the prosecution with Mr. Worthen's name. Thus his FBI "rap sheet" could not be obtained. It is significant to note, however, that the defense did *not* ask Mr. Worthen whether he had ever been convicted of a felony, but did ask that question of Mrs. Ortiz. This omission, quite obviously, left the jury with the impression that there was nothing in Worthen's background suggesting moral turpitude.

mony to be blatantly perjurious. The District Court, it is submitted, was entitled to evaluate this testimony and its effect on the truthseeking process, and to consider it in determining whether it was appropriate to restrain the government from relying on appellant's previous conviction for impeachment purposes.

Mrs. Ortiz's testimony also enabled the trial court reasonably to predict what the appellant's testimony would have been. Since Mrs. Ortiz testified she was constantly with her husband in February, and that her husband and Kiki Melendez were not on speaking terms at that time, the trial court could have reasonably concluded that appellant's testimony would have been essentially the same. In sum, the content of Mrs. Ortiz's testimony enabled the trial court more accurately to appraise the importance of appellant's testimony. The quality of her testimony enabled the trial court to gauge what the appellant's was likely to be. Appellant's failure to make an offer of proof, besides raising some question as to whether he ever intended to testify in any event, at the very least should be held to foreclose him from arguing that he possessed information significantly different from that given by his wife. *Cf. United States* v. *Aloi*, 511 F.2d 585, 596 (2d Cir. 1975).

Another factor the District Court was entitled to consider in exercising its discretion was, it is submitted, the manner in which the government's chief witness, Luis Lopez, was cross-examined. In the spirit of fairness the government elicited from Luis Lopez on direct examination every crime of which there was a record of him having been convicted in his entire life. *United States* v. *Rothman*, 463 F.2d 488 (2d Cir.), *cert. denied*, 409 U.S. 956 (1972) (Tr. 53-55). Not content with requestioning Lopez on these same convictions, the defense, despite objection by the prosecution, repeatedly impeached Lopez on

the basis of *arrests*, which occurred well prior to his presence, much less his cooperation in this District, and for which there were no dispositions (Tr. 126-130). This cross-examination, which was well beyond the bounds of propriety, so unjustifiably and unfairly impaired Lopez's credibility that it would have been too misleading to the jury to permit appellant to "appear as one entitled to full belief when that [was] not the fact." *United States* v. *Palumbo*, *supra*, 401 F.2d at 273. Also see *Gordon* v. *United States*, 383 F.2d 936, 941 (D.C.Cir. 1967), *cert. denied*, 390 U.S. 1029 (1968) (holding that in credibility contests between two persons—the accused and the accuser—there are "greater, not less, compelling reasons for exploring all avenues which would shed light on which of the two witnesses was to be believed"). In short, the circumstances which developed at trial were such that, were he permitted to have escaped impeachment, the appellant automatically would have appeared "pristine" by comparison to Luis Lopez. *Cf. United States* v. *Jackson*, 405 F.Supp. 938 (E.D.N.Y. 1975); *United States* v. *Reddington*, 433 F.2d 997 (4th Cir. 1970). This is hardly the case.

Based on all of the foregoing, the government respectfully submits that the District Court acted within, and did not commit an abuse of, its discretion under Rule 609(a)(1).

C. A conviction for distribution of heroin is a conviction involving "dishonesty" within the meaning of Rule 609(a)(2)

The government urges this Court to uphold the trial court's exercise of discretion under Rule 609(a)(1) of the Federal Rules of Evidence. Alternatively, however, the government submits that a heroin distribution conviction is a crime involving "dishonesty" within the mean-

ing of Rule 609(a)(2). Although this contention was recently rejected in *United States* v. *Millings*, 535 F.2d 121 (D.C.Cir. 1976), the government submits that it is realistic and completely consistent with the definition of *crimen falsi* employed Conference Committee on the Federal Rules. *Id.* at 123. See also *United States* v. *Cisneros*, 191 F.Supp. 924, 927-928 (N.D.Cal. 1961), *aff'd* 322 F. 2d 948 (9th Cir. 1961).

CONCLUSION

On the basis of all of the foregoing, the government respectfully submits that the judgment of the District Court is sound and that it should be affirmed.

Respectfully submitted,

PETER C. DORSEY
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New Haven, Connecticut 06508

THOMAS P. SMITH
Assistant United States Attorney for the District of Connecticut

GOVERNMENT'S APPENDIX

NOTICE

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT
Crim. Misc. H-76-29

UNITED STATES OF AMERICA

—v.—

JESUS ORTIZ, a/k/a "Chombo"

Peter C. Dorsey, the United States Attorney for the District of Connecticut, and Thomas P. Smith, his Assistant, do hereby accuse the defendant, Jesus Ortiz, a/k/a "Chombo", of having previously been convicted of violating laws of the United States relating to narcotic drugs, said previous convictions being that:

> On or about the 24th day of July, 1972, in the District of Connecticut, the defendant was convicted before the Honorable T. Emmet Clarie, of two counts charging him with a violation of Title 21, United States Code, section 841(a)(1);

and the judgment of said conviction is and has become prior to filing this information, a final judgment.

UNITED STATES OF AMERICA

/s/ PETER C. DORSEY
PETER C. DORSEY
United States Attorney

/s/ THOMAS P. SMITH
THOMAS P. SMITH
Assistant United States Attorney

A True Copy
ATTESTED
By: S. MARY ORSINI
Deputy Clerk

Government's Memorandum In Support of the Admissibility of Similar Criminal Acts to Show Intent, Knowledge, Modus Operandi, Identity, and Lack of Mistake

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Criminal No. H-76-29

UNITED STATES OF AMERICA

—v.—

JESUS ORTIZ, a/k/a "Chombo"

I.

Jesus Ortiz is the only defendant on trial in the instant case. The indictment in this case charges that he and one "Kiki" Melendez (who is not presently on trial) sold fifteen (15) bags of cocaine to an informant, Luis Lopez, on February 10, 1976. This sale took place outside the presence of the undercover Connecticut State Trooper, Rafael Valentin, who was supervising Luis Lopez at the time. There is ample evidence (i.e. conversation of co-conspirator "Kiki" Melendez) that the transaction was purposely conducted out of the presence of Trooper Valentin because "Kiki" Melendez and Jesus Ortiz did not know Valentin and were therefore reluctant to "deal" with him.

The government desires to introduce evidence that on the very next day, February 11, 1976, Jesus Ortiz again sold still more cocaine to Luis Lopez. On that date Ortiz

sold thirty (30) bags of cocaine, together with "Frankie" Melendez, the brother of "Kiki" Melendez. This second sale, which was conducted at the exact same location as the first sale, also took place out of the presence of Trooper Valentin.

Defense counsel has indicated to the prosecution that the defense in this case is a combination of three theories: mistaken identity, alibi, and fabrication on the part of the informant. The government believes these three theories can be proved to be false if the Court permits it to introduce evidence concerning the sale of cocaine by Jesus Ortiz on February 11, 1976. In sum, the government seeks leave of the Court to introduce evidence of a subsequent similar act to establish the identity of Jesus Ortiz as the person who sold cocaine on both occasions, to establish clear criminal intent on his part, and finally to establish that stealth was his modus operandi.

II.

The rule in the Second Circuit regarding the admissibility of evidence of "similar crimes" is *inclusionary*, rather than exclusionary. That is, evidence of other crimes is admissible except when offered *solely* to prove criminal character. *United States* v. *Vario*, 484 F.2d 1052, 1056 (2d Cir. 1973), *cert. denied*, 414 U.S. 1129 (1974); *United States* v. *Papadakis*, 510 F.2d 287, 294 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975); *United States* v. *Gerry*, 515 F.2d 130 (2d Cir. 1975), *cert. denied*, 423 U.S. 832 (1975). This rule is in no way altered by recent amendments to the Federal Rules of Evidence. *See* Rule 404(b) (specifically listing "plan, knowledge [and]

identity" among the permissible things which such evidence may be admitted to prove.)

It is also well-settled in this Circuit that evidence of *subsequent* crimes may be admitted to prove the same factors as may be proved through evidence of *prior* crimes. See, e.g., *United States* v. *Super*, 492 F.2d 319 (2d Cir.), *cert. denied*, 419 U.S. 876 (1974) (wherein evidence of a subsequent similar act was admitted to show defendant's membership in a conspiracy); *United States* v. *Nathan*, 476 F.2d 456, 460 (2d Cir. 1973), *cert. denied*, 414 U.S. 823 (1974); *United States* v. *Diorio*, 451 F.2d 21, 23 (2d Cir. 1971), *cert. denied*, 405 U.S. 955 (1972); *United States* v. *Marchisio*, 344 F.2d 652, 667, n.11 (2d Cir. 1965). In sum, evidence of subsequent similar acts stands on the same footing as evidence of prior similar acts.

III.

With respect to the February 10, 1976 sale of fifteen (15) bags of cocaine, only the informant Luis Lopez can place Ortiz at the scene of the crime. Ortiz was seen by no one else. The government can, however, through the use of surveillance officers establish that Jesus Ortiz was at the scene of the crime on February 11, 1976. This subsequent crime took place in the *same* apartment, in substantially the *same* manner, with the same type of narcotic drug approximately twenty-four (24) hours after the offense charged in the indictment. If the government is not permitted to introduce evidence of this transaction, Jesus Ortiz, a previously-convicted federal drug offender, may escape conviction by claiming that the informant is mistaken as to the identity of the person

from whom he brought cocaine on February 10, 1976. In actuality, the informant is not mistaken. The informant purchased cocaine on February 10, 1976 from the exact same man who sold cocaine to the informant on February 11, 1976. That man is Jesus Ortiz. There is, in sum, no mistake as to identity. The Court should admit evidence of this subsequent similar act to establish that fact. See e.g., *United States* v. *Ravich*, 421 F.2d 1196, 1205 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970); *Bradley* v. *United States*, 433 F.2d 1113, 1119 (D.C. Cir. 1969); *Abernathy* v. *United States*, 402 F.2d 582, 584 (8th Cir. 1968); *United States* v. *Johnson*, 382 F.2d 280 (2d Cir. 1967); *United States* v. *Frascone*, 299 F.2d 824 (2d Cir.), *cert. denied*, 370 U.S. 910 (1962); 2 J. Wigmore, *Evidence* §§ 410, 416 (3d ed. 1940).

IV.

Evidence concerning the sale of cocaine by Jesus Ortiz on February 11, 1976, should be deemed admissible for still another reason: to establish the plan, scheme, and modus operandi according to which Ortiz and his confederates sold narcotics. There is ample evidence to indicate that, while "Frankie" Melendez was not bashful about selling narcotics to the undercover Trooper who was introduced to the Melendez brothers by Luis Lopez, "Kiki" Melendez most clearly was. "Kiki" Melendez expressly indicated that he would not "deal" in the presence of Trooper Valentin, but would only sell to Luis Lopez out of Valentin's presence. Consequently Valentin was not able to enter the apartment of Jesus Ortiz when Luis Lopez purchased narcotics on February 10, 1976. And consequently, Valentin was not permitted to enter

the apartment of Jesus Ortiz on February 11, 1976, when "Frankie" Melendez and Jesus Ortiz cut and packaged the thirty (30) bags of cocaine that were sold by them to Lopez and Valentin on that date.

The law in this Circuit clearly permits introduction of evidence of a similar offense where that offense is logically connected with the offense charged, or where the two acts are so closely and inextricably intertwined as to form a pattern or system of criminal activity. Thus, in *United States* v. *Dornblut*, 261 F.2d 949, 951 (2d Cir. 1958), *cert denied*, 360 U.S. 912 (1959), the Court permitted introduction of evidence that defendant had sold narcotics on other occasions to show his purpose, knowledge of the trade, and intent.

V.

Evidence of the February 11, 1976, cocaine sale by Jesus Ortiz should also be admitted to establish criminal intent. There is no question but that Jesus Ortiz knew that the substance which he and the Melendez brothers were selling was cocaine, and that by combining with them, he was entering into two criminal conspiracies whose object was the same. The law in this Circuit is clear that evidence of prior and subsequent similar acts is admissible to show intent. See e.g., *United States* v. *Drummond*, 511 F.2d 1049, 1055 (2d Cir.), *cert. denied*, 423 U.S. 844 (1975) (proof of prior *unrelated* narcotics transaction admissible to show knowledge and intent).

Government's Memorandum In Support of the Admissibility of Similar Criminal Acts to Show Intent, Knowledge, Modus Operandi, Identity, and Lack of Mistake

VI.

In view of the foregoing the government respectfully submits that it should be permitted to introduce evidence of the sale of cocaine by Jesus Ortiz on February 11, 1976.

Dated at Hartford, Connecticut, this 27th day of July, 1976.

Respectfully submitted,

UNITED STATES OF AMERICA

PETER C. DORSEY
United States Attorney

By: THOMAS P. SMITH
THOMAS P. SMITH
Assistant United States Attorney

CERTIFICATION

This is to certify that a copy of the foregoing document was hand-delivered to defendant's counsel, Richard S. Cramer, Esquire, Assistant Federal Public Defender, at Hartford, Connecticut, this 27th day of July, 1976.

THOMAS P. SMITH
(Signed) THOMAS P. SMITH
Assistant United States Attorney

★ U. S. Government Printing Office 1976— 714—020—ACT—200

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 76-1460

U S A,
APPELLEE

v.

JESUS ORTIZ,
APPELLANT

AFFIDAVIT OF SERVICE BY MAIL

Patricia D. O'Hara, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 51 West 70th Street, New York, New York 10023

That on the 29th day of December, 1976, deponent served the within Brief and Appendix for the Appellee upon Richard S. Cramer, Esq., Asst. Federal Public Defender, 450 Main Street, Hartford, Connecticut 06103

Attorney(s) for the Appellant in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Patricia D. O'Hara

Sworn to before me,

This 29th day of December 1976

Edward A. Quimby

EDWARD A. QUIMBY
Notary Public, State of New York
No. 24-3183500
Qualified in Kings County
Commission Expires March 30, 1977